Supreme Court, U.S.

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No. _____

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In The
Supreme Court of the United States

ROSCOE R. BEATY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTION PRESENTED FOR REVIEW

Whether a criminal jury's rejection of an entrapment by estoppel defense in a gambling prosecution in which forfeiture was not at issue collaterally estops that defendant from offering the same evidence in support of an innocent owner, due process defense in a corresponding civil forfeiture action?

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Petitioner Roscoe R. Beaty respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *United States v. Beaty*, 245 F.3d 617 (6th Cir. 2001). (App. A). The opinion of the district court in *United States v. Beaty*, No. 3-92-0931 (M.D. Tenn. 1999) is not reported. (App. C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on April 2, 2001. The Court of Appeals denied the untimely petition for rehearing and for rehearing *en banc* on May 8, 2001. (App. B). This petition for writ of certiorari was filed within 90 days of the entry of the judgment of the Court of Appeals for the Sixth Circuit.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

18 U.S.C. § 981 (App. D).

18 U.S.C. § 983 (App. E).

18 U.S.C. § 1955 (App. F).

19 U.S.C. § 1615 (App. G).

STATEMENT OF THE CASE

In 1975, pursuant to 26 U.S.C. § 4401 *et seq.*, Petitioner Roscoe R. Beaty (hereafter "Petitioner" or "Mr. Beaty") registered with the Internal Revenue Service (IRS) as a wagerer and began paying occupational and wagering taxes upon the advice of ATF Agents designated to implement the "Compliance Program." Annually, Petitioner purchased a "gambling stamp" for $500 (the occupational tax). In addition, Petitioner filed monthly wagering returns (the wagering tax). The ATF agents explained that, by purchasing

a Federal gambling stamp, Petitioner assured himself that the federal government would not interfere with his gambling activities. Immediately following the meeting, Petitioner purchased the recommended gambling stamp.

It was Petitioner's understanding that the gambling stamp would immunize him from federal prosecution. In fact, Special Agent Rollins told Petitioner that he would be prosecuted if he failed to purchase the gambling stamp. Additionally, the ATF Agents informed Petitioner that by purchasing the stamp and by filing a monthly return enclosing payment of the 2% excise tax on gross wagers, his wagering would remain confidential and would not be disclosed to state and local authorities. Petitioner realized that by participating in the Compliance Program he was disclosing a violation of state law. However, he was not particularly concerned about state prosecution given the assurances of confidentiality and the local police's lackadaisical attitude toward prosecuting gambling offenses at that time. Petitioner relied on the assurances given by the ATF Agents; he faithfully purchased a gambling stamp each year and dutifully paid the monthly 2% wagering tax for 22 years. During this time, Petitioner paid occupational and wagering taxes exceeding $83,690.00.

It was not until 1992 that Petitioner began to feel law enforcement pressure regarding his gambling. In 1992, the local law enforcement officers raided his home pursuant to a State search warrant and seized approximately $1.47 million

in gambling proceeds. By all accounts, Petitioner was extremely cooperative during the search. As a result of the search and seizure, Petitioner was arrested and charged in State court with aggravated gambling promotion; these charges were ultimately dismissed. Petitioner believed that, although he was encountering trouble with the local authorities, he still enjoyed federal immunity from prosecution. Beginning in 1993, Petitioner became the target of several Federal search warrants which were executed in large part by State law enforcement officers. Although evidence of gambling activity was seized, Petitioner was not arrested. Approximately one year later on June 2, 1994, the IRS executed another Federal search warrant with the assistance of local authorities. This warrant again targeted Petitioner's gambling activities, and the authorities seized items relating to gambling. As before, Petitioner was not arrested.

Finally, on February 23, 1995, the IRS executed their final search warrants in this matter. Yet again, gambling paraphernalia was seized, and Petitioner was cooperative. However, this time, Petitioner was arrested. Following that arrest, the government charged Petitioner with operating an illegal gambling business, in violation of 18 U.S.C. § 1955 and 18 U.S.C. § 2, and conspiracy, in violation of 18 U.S.C. § 371.

Up until the time of his arrest by Federal authorities in

1995, Petitioner believed that he still enjoyed federal immunity from gambling prosecution. He thought that he could not be prosecuted federally for his actions pursuant to the Compliance Program. This expectation was bolstered by twenty (20) years of law enforcement disinterest in Petitioner's gambling coupled with the IRS's failure to arrest Petitioner at the conclusion of the 1993 and 1994 raids. Although Petitioner was confused by the IRS searches, he assumed that they were conducted as an auditing measure to assure that he was indeed paying the IRS what it was owed monthly in wagering tax.

There was a substantial amount of proof adduced at Petitioner's federal criminal trial regarding his reliance on the representations made by the ATF Agents at the initiation of the Compliance Program and his faith in the gambling stamp. In fact, four (4) cooperating government witnesses testified to this effect. During Petitioner's own testimony, he candidly and repeatedly admitted that he knew gambling was illegal. However, it was his belief that he had been immunized from Federal prosecution by his devoted participation in the Compliance Program.

After a brief deliberation on January 15, 1999, the jury found Petitioner guilty as to both the gambling conspiracy count as well as the substantive gambling count. Because the government chose to excise the criminal forfeiture count from the indictment prior to trial, the jury never considered the applicability of the entrapment by estoppel defense to the

forfeiture issue.

In related civil proceedings, the government filed four (4) separate Verified Complaints of Forfeiture asserting a government right to money seized during the execution of the four (4) search warrants. The first Verified Complaint sought forfeiture of $1,476,147.07 seized in 1992. Peitioner filed a timely Claim and requested a stay of the proceedings. The government filed three (3) other Verified Complaints which were ultimately consolidated with the first Verified Complaint for forfeiture. Petitioner filed timely Claims for each one.

At the Petitioner's behest, the district court stayed the civil forfeiture action during part of the pendency of the criminal proceedings. However, at the government's prompting on March 13, 1997, District Judge John T. Nixon lifted his previous Order staying the forfeiture action and ordered that Petitioner file an Answer to the Verified Complaints. Petitioner filed his Answer in timely fashion raising the defense of entrapment by estoppel.

After the conclusion of the criminal trial, the government filed a Motion for Summary Judgment claiming that there was no genuine issue of material fact in dispute and that it was entitled to a judgment as a matter of law. Petitioner filed a Response denying that the funds were properly forfeitable under 18 U.S.C. § 1955 since entrapment by estoppel is a defense to such action and since the facts underlying Petitioner's entrapment by estoppel defense were in dispute.

In turn, the government filed two separate replies to Petitioner's Response claiming that Petitioner was collaterally estopped from relitigating his entrapment by estoppel defense since the criminal jury rejected the defense in a related proceeding. On July 15, 1999 without conducting an adversarial hearing, Judge Nixon granted the government's Motion for Summary Judgment; this ruling was expressed in the District Court's Decree of Forfeiture. Subsequently, on August 16, 1999, Judge Nixon entered an Order adopting the government's Proposed Memorandum Opinion in its entirety with one exception. That correction is spelled out in the District Court's Order.

REASON FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT COURT OF APPEALS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION IN A MANNER THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Petitioner Beaty submits that the Court of Appeals' decision is contrary to the letter and spirit of: *Matshusita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); *Sorrells v. United States*, 287 U.S. 435, 77 L.Ed. 413, 53 S.Ct. 210 (1932); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-6, 114 S.Ct. 492, 126 L.Ed.2d. 490 (1993); and *Harmelin v. Michigan*, 501 U.S. 957, 979, n. 9, 111 S.Ct. 2680, 2693, n. 9, 115 L.Ed.2d 836 (1991).

The party seeking summary judgment must demonstrate that there is no material fact in dispute and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). The burden of proof in civil gambling forfeiture cases

such as this is set forth in 19 U.S.C. § 1615. *See*, 18 U.S.C. §§ 981(d) and 1955(d). 19 U.S.C. § 1615 states, in pertinent part:

> In all suits or actions . . . brought for [ ] forfeiture . . . where the property is claimed by any person, the burden of proof shall lie upon such claimant . . . . Provided, that probable cause shall be first shown for the institution of such suit or action, to be judged of by the court . . . .

Therefore, once the government meets its initial burden of showing probable cause to institute the forfeiture action, the burden then shifts to the claimant to show by a preponderance of the evidence that the property was not subject to forfeiture. *United States v. 526 Liscum Drive*, 866 F.2d 213, 216 (6th Cir. 1988); *See also, United States v. $22,287.00 in United States Currency*, 709 F.2d 442, 446 (6th Cir.1983). The probable cause which the government must show is "a reasonable ground for belief of guilt, supported by less than *prima facie* proof but more than mere suspicion." *526 Liscum Drive*, 866 F.2d at 216 (*quoting $22, 287.00 in United States Currency*, 709 F.2d at 446-47). Once the government demonstrates probable cause to institute the forfeiture

proceeding, the evidentiary burden shifts to the claimant to show by a preponderance of the evidence that forfeiture is not warranted. *See, e.g., United States v. 429 South Main Street*, 52 F.3d 1416, 1418 (6th Cir. 1995); *United States v. Rural Route 1, Box 137-B, Cutler, Ohio*, 24 F.3d 845, 848 (6th Cir. 1994); *$22,287.00 in United States Currency*, 709 F.2d at 446. To carry its burden, the non-moving party need only show that there is a genuine dispute over a material fact. *Matshusita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Moreover, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." Id. at 587 (*quoting United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)).

In this case, the government took the position that, because a criminal jury rejected Petitioner's fact intensive defense of entrapment by estoppel, Petitioner was collaterally estopped from relitigating those same facts in support of an innocent owner defense in a corresponding civil forfeiture action. Therefore, the government insisted that it was entitled to a Summary Judgment. However, the government, the district court and the Court of Appeals all failed to recognize the inapplicability of the collateral estoppel doctrine. Since the criminal jury did not deliberate on a criminal forfeiture count, it did not consider whether Petitioner's entrapment by estoppel defense barred forfeiture of the seized money.

Moreover, the facts underlying Petitioner's entrapment by estoppel defense were much more compelling as to the forfeiture than as to the underlying criminal allegations. For that reason, the government made the tactical decision not to present the criminal jury with a criminal forfeiture count; by doing so, the government strengthened its criminal case. Instead, the government chose the civil forfeiture route, and promptly after conviction, it pounced on the Summary Judgment band-waggon claiming collateral estoppel entitled it to the funds.

What the government and preceding courts have failed to apprehend is that a genuine issue of material fact does exist making Summary Judgment inappropriate and a trial on the merits necessary. Petitioner has offered factual support for his innocent owner defense - a defense which is inextricably intertwined with the due process defense of entrapment by estoppel. *See*, 18 U.S.C. §§ 981, 983(d), 1955(d). Obviously, such a defense is fact intensive, and certainly, the government disputes those foundational facts. Moreover, the doctrine of collateral estoppel is inapplicable under these circumstances. Therefore, these facts deserve litigation before a civil jury.

This Court has unanimously stated that a defendant has "a fundamental constitutional right to a fair opportunity to present a defense." *Crane v. Kentucky*, 476 U.S. 683, 687, 90 L.Ed.2d 636, 643, 106 S.Ct. 2142 (1986). This necessarily holds true in the context of civil forfeiture. The criminal jury

never reached the question of whether the monies seized were "illegally derived proceeds." Hence, the criminal jury was never presented and therefore, never reached, the dispositive issue in the corresponding civil forfeiture action (i.e., was Petitioner an innocent owner protected by the doctrine of collateral estoppel?). Consequently, collateral estoppel has no baring on the civil forfeiture action.

In support of its theory regarding collateral estoppel, the government relied *United States v. Three Tracts of Property Located on Beaver Creek*, 994 F.2d 287 (6th Cir. 1993). The *Beaver Creek* Court held:

> The doctrine of collateral estoppel, or issue preclusion, applies if three requirements are met. First, the issue in the prior trial must have been identical. Second, the issue must actually have been litigated. Third, it must have been necessary and essential to the judgment on the merits.

Id at 290 (*citing United States v. Smith*, 730 F.2d 1052 (6th Cir. 1984)). In *Beaver Creek*, the Sixth Circuit reversed the district courts order of Summary Judgment under similar circumstances holding that the doctrine of collateral estoppel was inapplicable. *Id.* As in *Beaver Creek*, forfeiture was not in issue at the criminal trial, and a finding that the currency represented proceeds of an unlawful activity was not "necessary and essential to the judgment on the merits of the criminal case." *Id.* Therefore, the three elements of collateral

estoppel do not coexist, and the Sixth Circuit's reliance upon collateral estoppel to usurp Petitioner's right to due process was in error.

In *United States v. James Daniel Good Real Property*, this Court astutely observed:

> The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision making. That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding.

510 U.S. 43, 55-6, 114 S.Ct. 492, 126 L.Ed.2d. 490 (1993) (*citing Harmelin v. Michigan*, 501 U.S. 957, 979, n. 9, 111 S.Ct. 2680, 2693, n. 9, 115 L.Ed.2d 836 (1991)(opinion of SCALIA, J.) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit"). This case is no exception.

CONCLUSION

For reasons stated herein, the Petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
FILED APRIL 2, 2001

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff-Appellee	)	Nos.
	)	99-5756/6115
v.	)	
	)	
ROSCOE R. BEATY,	)	
	)	
Defendant-Appellant	)	

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
Nos. 92-00931; 93-00572; 94-00568; 95-0259;
95-00024 - John T. Nixon, District Judge.

Argued: January 23, 2001

Decided and Filed: April 2, 2001

Before: BATCHELDER and CLAY, Circuit Judges;
POLSTER, District Judge*

COUNSEL

ARGUED: Peter J. Strianse, TUNE, ENTREKIN & WHITE, P.C., Nashville, Tennessee, for Appellant. William M. Cohen, ASSISTANT UNITED STATES ATTORNEY, Nashville, Tennessee, for Appellee. ON BRIEF: Peter J. Strianse, TUNE, ENTREKIN & WHITE, P.C., Nashville, Tennessee, for Appellant. William Cohen, Van S. Vincent, ASSISTANT UNITED STATES ATTORNEYS, Nashville, Tennessee, for Appellee.

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* The Honorable Dan Aaron Polster, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

POLSTER, District Judge. Defendant Roscoe R. Beaty appeals from his jury conviction and sentence for operating an illegal gambling business and the district court's grant of summary judgment in favor of the government in four related civil forfeiture actions. For the following reasons, we **AFFIRM**.

I. BACKGROUND

A. Criminal Case (Case No. 99-5756)

Federal law enforcement officers arrested Beaty on February 23, 1995, after a lengthy investigation of a gambling ring involving Beaty and several other individuals. On March 21, 1995, a grand jury returned a two-count indictment against Beaty and six other defendants. Count One charged that between February 1992 and February 1995, the defendants conspired to conduct an illegal gambling business in violation of 18 U.S.C. § 1955.[1] Count Two charged that during the same period, the defendants ran a numbers operation in violation of 18 U.S.C. §§ 2 and 1955.[2]

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[1] The grand jury identified five separate instances in which the defendants possessed money and gambling paraphernalia in furtherance of the conspiracy and in violation of 18 U.S.C. § 371.

[2] The government subsequently filed a superseding (continued...)

Beaty's criminal case proceeded to trial on November 5, 1996. That trial ended in a mistrial when the jury was unable to reach a verdict. Beaty's second jury trial commenced on January 12, 1999. At trial, Beaty admitted that he had engaged in the conduct charged, but argued that the government should be estopped from prosecuting him because it had led him to believe that purchasing a federal gambling stamp each year and paying monthly taxes on his gross wagers would immunize him from prosecution. Beaty offered the testimony of a former federal agent who confirmed that in the mid 1970s, gamblers were told that if they purchased a stamp they would not be the target of a federal investigation and their gambling activities would not be subject to federal prosecution.

The government countered this testimony by noting that the stamp itself contained the following language:

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[2](...continued)
indictment charging Beaty with a third count seeking forfeiture of $2,097,501.93 and a cell phone used in commission of the felony charged in Count Two. The district court denied Beaty's motion to dismiss the superseding indictment on double jeopardy grounds. Beaty appealed the denial of his motion to the Sixth Circuit, which affirmed, and then sought review by the U.S. Supreme Court. The district court allowed the case to go to trial while Beaty's petition for certiorari was pending.

> Please note that this is a special tax stamp in receipt for payment of Federal tax. This does not authorize anyone to begin or continue trade or business contrary to State or local laws. Also, payment of the tax imposed by Chapter 35 of the Internal Revenue Code does not exempt anyone from penalties or punishment for violation of Federal, State, or local laws concerning wagering activities.

The government also offered the testimony of several gamblers who admitted that they knew the stamp would not immunize them from federal prosecution. One of those witnesses testified that during the course of the investigation an agent informed him that the stamp offered no protection from federal prosecution for wagering activities. The witness claimed that he had related his conversation with the agent to Beaty after one of the raids on their organization.

During the trial, the district court instructed the jury on the defense of entrapment by estoppel. Over defense counsel's objections, the court also provided the jury with the following instruction on deliberate ignorance:

> No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you're convinced that the defendant deliberately

> ignored a high probability that he was involved in an illegal gambling operation under the federal laws, then you may find that he knew what he was doing.
>
> But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that he was involved in an illegal gambling operation under the federal laws and the defendant deliberately closed his eyes to what was obvious.
>
> Carelessness or negligence or foolishness on his part is not the same as knowledge and is not enough to convict.

The court adopted this instruction verbatim from Pattern Criminal Jury Instructions for the Sixth Circuit § 2.09 (West 1991).

After deliberating for less than two hours, the jury returned guilty verdicts on both Count One and Count Two. Prior to the Sentencing Hearing, a U.S. Probation Officer provided the district court with a Presentence Investigation Report which recommended that Beaty be granted a two-level reduction in his offense level for acceptance of responsibility

pursuant to United States Sentencing Guideline ("U.S.S.G.") § 3E1.1.[3] The government objected to the recommendation, arguing that Beaty was not entitled to an acceptance of responsibility reduction because he had contested the legality of his conduct. At the Sentencing Hearing, the district court denied Beaty the two-level reduction for acceptance of responsibility and imposed a sentence of twenty-one months imprisonment, two years of supervised release, and a $4,000.00 fine.

On appeal, Beaty argues that the district court erred by: (1) giving a deliberate ignorance instruction to the jurors; and (2) failing to reduce his offense level for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1.

B. Civil Forfeiture Cases (99-6115)

Surveillance of Beaty's gambling activities began in

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[3] Section 3E1.1 states that a defendant may receive a two-level decrease in his offense level if he "clearly demonstrates acceptance of responsibility for his offense." U.S. Sentencing Guidelines Manual § 3E1.1 (1998). The Application Notes state: "In rare situations, a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert or preserve issues that do not relate to factual guilt...." Id. at cmt. n. 2.

early 1992, when a concerned citizen called the Metropolitan Nashville Police Department ("Nashville Police") to report a numbers operation in Nashville, Tennessee. On March 12, 1992, the Nashville Police executed search warrants at various locations, including Beaty's home. The Nashville Police seized numbers tickets and $1,454,788.20 from Beaty's bedroom. Due to the large quantity of money seized, the Nashville Police contacted the Internal Revenue Service ("I.R.S."), and the two agencies began a joint investigation of Beaty's numbers operation. On October 21, 1992, the government filed a complaint seeking forfeiture of $1,476,147.07 seized in the raid on March 12, 1992. On April 28, 1993, the district court agreed to stay the proceeding pending resolution of any related criminal cases.

After continued surveillance of the numbers operation, federal law enforcement officers executed another search of Beaty's home and various other locations on June 24, 1993. The officers seized numbers tickets and $514,601.40 from Beaty's home. On July 28, 1993, the government filed a forfeiture complaint seeking the forfeiture of money seized during the search.

Surveillance of Beaty's numbers operation began again following the execution of the June 1993 search warrants. Observation of gambling-related activities over the next year led to the execution of another set of search warrants in early

June 1994. Once again, the government seized money and gambling paraphernalia from Beaty's home and other locations. On July 15, 1994, the government filed another forfeiture complaint seeking the money seized during the prior month's searches.

Continued surveillance of Beaty's numbers operation caused federal authorities to execute a fourth and final set of search warrants on February 23, 1995. That search resulted in the seizure of cash, numbers tickets, and betting pads, and led to the arrest and eventual conviction of Beaty. On March 17, 1995, the government filed a forfeiture complaint seeking money seized in the raids on February 23, 1995.

On February 14, 1997, the district court reinstated the first forfeiture complaint to the active docket and vacated the stay. The district court consolidated the four forfeiture proceedings into one case on September 30, 1998. In October 1998, the government moved for summary judgment. Beaty opposed the motion for summary judgment by arguing that there was a genuine issue of material fact regarding his alleged entrapment by the federal government.

On July 12, 1999, the district court granted the government's motion and entered a decree of forfeiture. Beaty filed a timely Notice of Appeal, after which the district court issued an order explaining its reasons for granting the motion.

In the order, the district court indicated that it granted the motion for summary judgment after concluding that Beaty had litigated the entrapment by estoppel issue during the related criminal proceeding and that as a result, the defense was barred by the doctrine of collateral estoppel. On appeal, Beaty argues that the district court erred by granting the government's motion for summary judgment because his defense of entrapment by estoppel raised factual issues that should have precluded an award of summary judgment.

II. ISSUES ON APPEAL

A. Deliberate Ignorance Instruction

Citing *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990), Beaty contends that the district court erred by giving a deliberate ignorance instruction in the absence of evidence showing that: (1) the defendant was subjectively aware of a high probability of the existence of illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct. Beaty argues that because the government failed to make such a showing, there is a substantial risk that the jury convicted him based upon a mere negligence standard rather than proof beyond a reasonable doubt.

We review a district court's choice of jury instructions according to an abuse discretion standard. *United States v. Prince*, 214 F.3d 740, 761 (6th Cir.), cert. denied, *White v. United States*, --- U.S. ----, 121 S.Ct. 417, 148 L.Ed.2d 322

(2000). A trial court has broad discretion in drafting jury instructions and does not abuse its discretion unless the jury charge "fails accurately to reflect the law." *United States v. Layne*, 192 F.3d 556, 574 (6th Cir.1999), *cert. denied*, 529 U.S. 1029, 120 S.Ct. 1443, 146 L.Ed.2d 330 (2000) (quoting *United States v. Busacca*, 863 F.2d 433, 435 (6th Cir.1988)). Moreover, no single provision of the jury charge may be viewed in isolation, rather, the charge must be considered as a whole. *United States v. Lee*, 991 F.2d 343, 350 (6th Cir.1993). We will reverse a judgment based upon an improper jury instruction " 'only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial.' " *United States v. Harrod*, 168 F.3d 887, 892 (6th Cir.), *cert. denied*, 526 U.S. 1127, 119 S.Ct. 1785, 143 L.Ed.2d 813 (1999) (quoting *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71, 72-73 (6th Cir.1990)).

Beaty's claim that the district court erred by giving a deliberate ignorance instruction in the absence of sufficient evidence is controlled by *United States v. Mari*, 47 F.3d 782 (6th Cir.1995). In *Mari*, this Court held that when a district court gives a deliberate ignorance instruction that does not misstate the law but is unsupported by sufficient evidence, it is, at most, harmless error. *Id.* In subsequent cases we have reaffirmed our thinking in *Mari*. *See, e.g.*, *United States v. Monus*, 128 F.3d 376, 390-91 (6th Cir.1997) ("[E]ven if there had been insufficient evidence to support a deliberate

ignorance instruction, we must assume that the jury followed the jury charge and did not convict on the grounds of deliberate ignorance.").

The court below strictly adhered to the wording of the Sixth Circuit Pattern Jury Instruction which accurately states the law of this Circuit. *See, e.g., United States v. Gullett*, 713 F.2d 1203, 1212 (6th Cir.1983) ("[Instruction which permits knowledge to be inferred] does not authorize a conviction based on negligent behavior, but rather prevents a criminal defendant from escaping conviction merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct."). The pattern instruction does not encourage a conviction based upon mere negligence, and indeed, expressly cautions against such a finding. Pattern Criminal Jury Instructions for the Sixth Circuit § 2.09 (West 1991) ("Carelessness or negligence or foolishness on his part is not the same as knowledge and is not enough to convict."). Moreover, at several other points during its jury charge, the district court reminded the jury that it could not convict Beaty unless it found him guilty beyond a reasonable doubt.

Because the district court did not misstate the law regarding deliberate ignorance and the instructions, viewed as a whole, were not confusing, misleading, or prejudicial, we conclude that the district court did not commit reversible error in giving the deliberate ignorance instruction.

B. Acceptance of Responsibility

Beaty further contends that the district court erred by refusing to reduce his offense level for acceptance of responsibility. We disagree.

A district court's decision regarding whether to reduce a defendant's offense level for acceptance of responsibility is a factual determination that is subject to a clearly erroneous standard of review. *United States v. Carroll,* 893 F.2d 1502, 1511-12 (6th Cir.1990). As this Court has noted:

> Because the trial court's assessment of a defendant's contrition will depend heavily on credibility assessments, the "clearly erroneous" standard will nearly always sustain the judgment of the district court in this area. Indeed, the guidelines specifically state that "[t]he sentencing judge is in a unique position to evaluate the defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review and should not be disturbed unless it is without foundation."

Id. (quoting *United States v. Thomas*, 870 F.2d 174, 176 (5th Cir.1989)).

In support of his contention that he is entitled to a reduction in his offense level, Beaty cites *United States v. Fleener*, 900 F.2d 914 (6th Cir.1990). In *Fleener*, we held that a district court did not err in granting a reduction for acceptance of responsibility where a defendant went to trial in order to raise an entrapment defense. Id. Although our decision in *Fleener* recognizes that it is within a district court's discretion to grant a reduction for acceptance of responsibility to a defendant who proceeds to trial to raise an entrapment defense, it does not stand for the proposition that any defendant who raises an entrapment defense is entitled to a reduction in his offense level for acceptance of responsibility. Rather, *Fleener* stands for the proposition that the decision of whether to grant a reduction for acceptance of responsibility to a defendant who has proceeded to trial to present an entrapment defense rests with the discretion of the trial judge. The trial judge in this case expressly recognized that in rare circumstances a court may grant a defendant who proceeds to trial a reduction for acceptance of responsibility, but found that such a reduction was not warranted

in this case.[4] There is nothing in the record to suggest that this determination was clearly erroneous. For this reason, we affirm the determination of the court below.

C. Collateral Estoppel

With regard to the civil forfeiture action, Beaty argues that the district court erred by granting summary judgment in favor of the government after determining that his entrapment defense was precluded by the doctrine of collateral estoppel.

We review a district court's grant of summary judgment de novo making all reasonable inferences in favor of the non-moving party. *E.E.O.C. v. University of Detroit*, 904 F.2d 331, 334 (6th Cir.1990). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When we review a motion for summary judgment, the evidence, all facts, and any inferences that may be drawn from the facts

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[4] At the Sentencing Hearing, the judge stated: "I am not going to give Mr. Beaty credit for acceptance of responsibility. I don't think it falls within the rare instance of going to trial and being given credit for acceptance of responsibility."

must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). To prevail, the party opposing summary judgment must show sufficient evidence to create a genuine issue of material fact. *Klepper v. First Am. Bank*, 916 F.2d 337, 341-42 (6th Cir.1990). A mere scintilla of evidence is insufficient, as "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In a forfeiture action, the government has the initial burden of showing probable cause to support the forfeiture. *United States v. Any and All Radio Transmission Equip.*, 218 F.3d 543, 548 (6th Cir.2000). Probable cause exists where there is "a reasonable ground for belief of guilt, supported by less than prima facie proof, but more than mere suspicion." *United States v. Twenty-Two Thousand, Two Hundred Eighty Seven Dollars ($22,287), U.S. Currency*, 709 F.2d 442, 446-47 (6th Cir.1983) (quoting *United States v. One 1978 Chevrolet Impala*, 614 F.2d 983, 984 (5th Cir.1980)). In

addition to establishing probable cause for the seizure, the government must establish probable cause that there was a nexus between the property seized and the illegal conduct giving rise to its forfeiture. *United States v. Real Prop. Known and Numbered as 429 S. Main St., New Lexington, Ohio*, 52 F.3d 1416, 1418 (6th Cir.1995). Once the government establishes probable cause for the forfeiture and satisfies the nexus requirement, the burden shifts to the claimant, who must prove by a preponderance of the evidence that the property is not subject to forfeiture. *Any and All Radio Transmission Equip.*, 218 F.3d at 548. "It is well settled that the government is entitled to a judgment of forfeiture upon an unrebutted showing of probable cause." Id. (quoting *United States v. Certain Real Prop. 566 Hendrickson Blvd.*, 986 F.2d 990, 995 (6th Cir.1993)).

Beaty contends that the district court erred in granting summary judgment because his entrapment by estoppel defense raises a genuine issue of material fact as to the existence of probable cause. The government argues that the district court's award of summary judgment was proper because the doctrine of collateral estoppel precluded Beaty from raising the entrapment by estoppel defense. Rather than addressing the applicability of the doctrine of collateral estoppel, Beaty instead focuses upon the fact intensive nature of the entrapment by estoppel defense.

The doctrine of collateral estoppel operates when three requirements are met: (1) the issue in the current action and the prior action are identical; (2) the issue was actually litigated; and (3) the issue was necessary and essential to the judgment on the merits. *See, e.g., United States v. Three Tracts of Prop. Located on Beaver Creek, Knott County, Kentucky*, 994 F.2d 287, 290 (6th Cir.1993). No rule of law precludes a prior criminal conviction from having preclusive effect in a subsequent civil proceeding between the government and the defendant. *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568, 71 S.Ct. 408, 95 L.Ed. 534 (1951) ("It is well established that a prior criminal conviction may work an estoppel in favor of the government in a subsequent civil proceeding."). Moreover, "[i]n the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment." Id. at 569, 71 S.Ct. 408.

The entrapment by estoppel defense Beaty seeks to raise in the forfeiture proceeding is identical to the defense he presented at his criminal trial. In both the criminal and the civil contexts, Beaty's burden of proof for establishing the defense is the same--preponderance of the evidence. *See, e.g., United States v. Stewart*, 185 F.3d 112, 124 (3d Cir.), *cert. denied*, 528 U.S. 1063, 120 S.Ct. 618, 145 L.Ed.2d 512 (1999). At trial, Beaty called witnesses and introduced

evidence in support of his entrapment by estoppel defense. Therefore, there is little question that he actually litigated the issue. Nor is there any doubt that the jury's determination on the issue was necessary and essential to a judgment on the merits. At trial, the judge specifically instructed the jury to find Beaty not guilty if he established the entrapment by estoppel defense by a preponderance of the evidence. In order to convict Beaty, the jury had to conclude that the preponderance of the evidence did not support the entrapment by estoppel defense. Accordingly, the district court correctly concluded that all three requirements for collateral estoppel had been satisfied.

Because Beaty's sole objection to the district court's grant of summary judgment depends upon the availability of the defense he was estopped from asserting, the district court did not err in granting the government's motion for summary judgment. [5]

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[5] During oral argument, Beaty's counsel argued that the currency seized from Beaty was not proceeds and that an innocent owner defense should apply. Beaty did not raise these arguments in the court below or in his appellate brief. Consequently, the arguments must be deemed waived. *See, e.g., Bauer v. Varity Dayton-Walther Corp.*, 118 F.3d 1109, 1113 (6th Cir.1997).

III. CONCLUSION

For the reasons stated above, we **AFFIRM** the judgments of the district court in both the criminal case (Case No. 99-5756) and the civil forfeiture proceeding (Case No. 99-6115).

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 8, 2001

99-5756/6115

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ORDER
	)	
ROSCOE R. BEATY,	)	
	)	
Defendant-Appellant	)	

BEFORE: BATCHELDER and CLAY, Circuit Judges; and POLSTER, * District Judge.

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* Hon. Dan A. Polster, United States District Judge for the Northern District of Ohio, sitting by designation.

The court having received a petition for rehearing en banc, and the petition having been circulated no only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	3:92-0931
	)	Judge Nixon
$1,476,147.07 IN UNITED	)	
STATES CURRENCY AND	)	
COIN, et, al.	)	

ORDER

Pending before the Court is Plaintiff's Motion for Summary Judgment, Motion for Summary Judgment Unopposed, and Renewed Motion for Summary Judgment. (Doc. Nos. 35, 37, 39.) Claimant Roscoe R. Beaty filed a Response to Plaintiff's Motion for Summary Judgment, (Doc. No. 44), to which Plaintiff filed a Reply, (Doc. No. 42).[1]

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[1] The instant action is related to a criminal action in which Claimant Roscoe R. Beaty was the defendant. (Case No. 3:95-00024.) The criminal case against Mr. Beaty was brought pursuant to 18 U.S.C. § 1955, which prohibits

Plaintiff has submitted a proposed Memorandum Opinion containing proposes findings of facts and conclusions of law with respect to Plaintiff's Motions for Summary Judgement.[2] Upon review of the relevant documents and the record in both the instant civil forfeiture action and the related criminal action against Claimant Beaty, the Court GRANTS Plaintiff's Motion for Summary Judgment. The court hereby ADOPTS Plaintiff's Memorandum Opinion in its entirety, with the exception of one section on page 29 which construes United States v. $50,000 U.S. Currency, 757 F.2d 103 (6th Cir. 1985), as preventing entrapment by estoppel from being used as a

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conducting, financing, managing, supervision, direction or ownership of all or part of illegal gambling businesses. 18 U.S.C. § 1955(a), (b). A trial held in January, 1999 before this Court resulted in Mr. Beaty's conviction on all charges.

The proceedings in the instant civil forfeiture action were stayed during the course of the criminal trial against Beaty. After the conclusion of the criminal proceedings, a Decree of Forfeiture was entered. (Doc. No. 46.) Claimant Beaty has since filed a Notice of Appeal with the Sixth Circuit. (Doc. No. 47.)

[2] Plaintiff's Memorandum Opinion is attached hereto as "Exhibit A." Findings of fact and conlusions of law on the issue of summary judgment are necesasry should Claimant Beaty's appeal proceed.

defense to a civil forfeiture action in this Circuit. (Mem. Op. At 29.) The Court declines to read $50,000 so broadly and believes this statement to be an inaccurate assessment of the law. Accordingly, that section of Plaintiff's Memorandum Opinion is not adopted by the Court and is not considered part of the holding of this Order. This case is hereby DISMISSED with prejudice.

In light of the above, Plaintiff's unopposed Motion for Summary Judgment, (Doc. No. 37), and Renewed Motion for Summary Judgment, (Doc. No. 39) are DENIED as MOOT.

It is so ORDERED.

Entered this12th day of August, 1999.

s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)
	) Civil No. 3:92-0931
v.	) Judge Nixon
$1,476,147.07 IN UNITED STATES CURRENCY AND COIN, et. al. Defendant.	)

AND

UNITED STATES OF AMERICA, Plaintiff,	)
	) Civil No. 3:93-0572
v.	) Judge Nixon
$514,601.40 IN UNITED STATES CURRENCY AND COIN, Defendant.	)

AND

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 3:94-0572
	)	Judge Nixon
$101,533.86 IN UNITED STATES CURRENCY AND COIN,	)	
Defendant.	)	

AND

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 3:95-0259
	)	Judge Nixon
$8,509.00 IN UNITED STATES CURRENCY; and ONE MOTOROLA 8000 HAND-HELD CELLULAR TELEPHONE, SERIAL NUMBER 891ERL7Y, WITH THREE BATTERIES,	)	
Defendant.	)	

MEMORANDUM OPINION (Excerpt)

On October 7, 1998, the United States filed a motion for summary judgment, memorandum in support thereof and statement of facts (Case No. 3:92-0931; Docket Nos. 34, 35, and 36). The United States filed a renewed motion to grant summary judgment on December 21, 1998 (Case No. 3:92-0931; Docket No. 39). On December 23, 1998, Claimant Beaty responded to the United States' statement of facts (Case No. 3:92-0931; Docket No. 41) and on January 7, 1999, responded to the motion for summary judgment (Case No. 3:92-0931; Docket No. 44).

* * * *

CLAIMANT'S DEFENSE OF ENTRAPMENT BY ESTOPPEL

The Claimant contends that summary judgment is not appropriate on the basis that his assertion of the defense of entrapment by estoppel in his federal criminal case provides a defense in the instant case by creating an issue of fact sufficient to overcome the United States' Motion For Summary Judgment.

In United States v. $50,000 U.S. Currency, 757 F.2d 103 (6th Cir. 1985), the Sixth Circuit upheld the district court's finding that "[t]he government is entitled to forfeiture even if the conviction is reversed on the grounds of entrapment by estoppel." Id. at 104. In $50,000, the United States filed a civil forfeiture action alleging that the defendant

$50,000 was used in an illegal sale or exchange for a controlled substance in violation of 21 U.S.C. 881(a)(6). A claim was filed by Glenn Lasuita in the forfeiture action. Lasuita was also charged criminally with the conduct underlying the forfeiture. Id. at 104. Lasuita's criminal conviction was reversed and remanded for a new trial on the ground of an error in the charge of the district court to the jury with respect to the defense of entrapment. Id. Lasuita also asserted the defense of entrapment by estoppel in the civil forfeiture action in response to the United States' Motion For Summary Judgment. Id. The district court rejected the claimant's attempt to defeat the motion for summary judgment on the basis of a defense of entrapment by estoppel. Id. The district court noted that the defense of entrapment is a defense based on the policy that because of the circumstances a person ought not be convicted of a crime he has committed, rather than because the crime was in fact committed. Id. The Sixth Circuit affirmed the district court's ruling and in doing so, the court noted that the Government bears the initial burden of showing a probable cause that the currency was furnished in exchange for a controlled substance and that the burden then shifts to the claimant to prove that the money was not used in violation of the statute. $50,000 at 105. The appellate court found that there was no dispute that the currency involved was furnished by Lasuita for the purchase of marijuana or that the money was delivered to a

DEA agent to purchase marijuana. Id. at 105. The appellate court also found that there was no genuine issue of fact in dispute. Id.

The result of the appellate court's decision in $50,000 is that in this Circuit, entrapment by estoppel is not a defense to a forfeiture action. United States v. $50,000 U.S. Currency, 757 F.2d 103, 106 (6th Cir. 1985); United States v. Premises Known as 326 Spruce Street S.E., Grand Rapids, County of Kent, Michigan, Slip No. 91-1697 (6th Cir. 1991) (district court's holding that a defense of entrapment by estoppel is not available in a civil forfeiture proceeding under Sixth Circuit law affirmed).

The Claimant is also collaterally estopped from raising the defense of entrapment by estoppel in this forfeiture action. On Tuesday, January 12, 1999, Claimant was retired on his two count indictment, in Criminal Case No. 3:95-00024. This trial took place before this Court and this Court takes judicial notice of the facts and arguments presented in Criminal Case No. 3:95-00024 for the purpose of determining summary judgment in these civil forfeiture cases. The Claimant was represented in his criminal case by the same counsel as in this forfeiture action, and the United States was represented in the criminal action by the counsel of record in this forfeiture action.

Count one of the indictment charged the Claimant with conspiracy to violate 18 U.S.C. § 1955 from February

1992 through February 1995. Count two of the indictment charged the defendant with violating 18 U.S.C. § 1955 on March 13, 1992, June 24, 1993, June 2, 1994 and February 23, 1995.

The Claimant, in his criminal trial, raised the defense of entrapment by estoppel, arguing that ATF agents told him that he would not be prosecuted by the federal government if he purchased a tax stamp, and therefore should not be found to have violated the federal gambling statutes. On Friday, January 15, 1999, the jury returned a verdict of guilty as to both counts of the indictment, rejecting the Claimant's defense of entrapment by estoppel.

In United States v. Three Tracts of Property Located on Beaver Creek, 994 F.2d 287 (6th Cir. 1993), the United States brought a civil forfeiture action against the defendant real property as well as currency in the amount of $29,100.00 on the basis that the defendants were used or intended to be used to facilitate, or were derived from illegal drug activities, in violation of 21 U.S.C. § 881(a)(7), and additionally that the defendant currency was subject to forfeiture pursuant to 21 U.S.C. § 881 (a)(6) as proceeds of the crime. Id. at 289. The Claimants in the civil forfeiture action were Claude Hall, Sr., Dona Hall, and Claude Hall, Jr. and Sandra Hall. Id. Claimants Claude Hall, Sr., Donna Hall and Claude Hall, Jr., were also charged in a criminal case involving the same facts and were found guilty by a jury. Id. The district court, relying

upon the former criminal adjudication, granted the government's motion for summary judgment. Id. The district court found that the convicted claimants were collaterally estopped from denying forfeitability in the civil forfeiture action. Id. at 289. The district court also found that there were sufficient facts separate from those developed in the criminal trial of the convicted claimants to support the forfeiture of Sandra Hall's property interests. Id. All claimants appealed. The Sixth Circuit affirmed the granting of the motion for summary judgment and the district court's application of the doctrine of collateral estoppel as to the convicted claimants in relation to the defendant real property. Id. at 290. The court noted that the doctrine of collateral estoppel applies if the following three criteria are met: 1) the issue in the prior trial must be identical; 2) the issue must have been litigated; and 3) it must have been necessary and essential to the judgment on the merits. Id. The court found, however, that the foregoing criteria were not met as to the defendant currency, and remanded the case for further proceedings in relation to the currency. Id. at 290-291.

In the present forfeiture action, the only issue alleged by Claimant Beaty to be in dispute is whether he has a defense of entrapment by estoppel to the forfeiture action. There is no dispute that the monies subject to forfeiture were used in a gambling business which was violative of the laws of the state of Tennessee, involved five or more persons who

conducted the business, was in substantially continuous operation for a period in excess of 30 days and had a gross revenue of $2000 in a single day. The criteria for collateral estoppel to apply to Claimant Beaty's argument of entrapment by estoppel in this forfeiture action have been met. The entrapment issue litigated in claimant Beaty's criminal trial is the same entrapment issue raised in the civil forfeiture action. The issue of entrapment was litigated in the criminal case, with Claimant Beaty calling witnesses and introducing evidence of his defense of entrapment by estoppel. The issue of entrapment by estoppel was necessary and essential to the judgment on the merits in Claimant Beaty's criminal case, as the Claimant could not be found guilty of the charged conduct if he was entrapped. The jury in the criminal trial was so informed. As the issue of entrapment by estoppel was previously litigated between the United States and Claimant Beaty, the Court finds that the issue of whether the Claimant has a defense of entrapment by estoppel has been determined and is not available in this forfeiture action.

CONCLUSION

For the foregoing reasons, the court finds there are no material facts in dispute in this matter and that summary judgment is granted in favor of the Plaintiff, United States of America.

APPENDIX D

18 U.S.C. § 981 provides, in pertinent part, as follows:

(a)(1) The following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324(a) of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

. . . . .

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or any offense constituting "specified unlawful activity" (as defined in section 1956(c)(7) of this title), or a conspiracy to

commit such offense.

. . . . .

(2) For purposes of paragraph (1), the term "proceeds" is defined as follows:

(A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

. . . . .

(b)(1) Except as provided in section 985, any property subject to forfeiture to the United States under subsection (a) may be seized by the Attorney General and, in the case of property involved in a violation investigated by the Secretary of the Treasury or the United States Postal Service, the property may also be seized by the Secretary of the Treasury or the Postal Service, respectively.

(2) Seizures pursuant to this section shall be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal

Procedure, except that a seizure may be made without a warrant if--

(A) a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims;

(B) there is probable cause to believe that the property is subject to forfeiture and--

(i) the seizure is made pursuant to a lawful arrest or search; or

(ii) another exception to the Fourth Amendment warrant requirement would apply; or

(C) the property was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency.

(3) Notwithstanding the provisions of rule 41(a) of the Federal Rules of Criminal Procedure, a seizure warrant may be issued pursuant to this subsection by a judicial officer in any district in which a forfeiture action against the property may be filed under section 1355(b) of title 28, and may be executed in any district in which the property is found, or transmitted to the central authority of any foreign state for service in accordance with

any treaty or other international agreement. Any motion for the return of property seized under this section shall be filed in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

. . . . .

(f) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(g)(1) Upon the motion of the United States, the court shall stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case.

(2) Upon the motion of a claimant, the court shall stay the civil forfeiture proceeding with respect to that claimant if the court determines that--

(A) the claimant is the subject of a related criminal investigation or case;

(B) the claimant has standing to assert a claim in the civil forfeiture proceeding; and

(C) continuation of the forfeiture proceeding will burden the right of the claimant against self-incrimination in the related investigation or case.

(3) With respect to the impact of civil discovery described in paragraphs (1) and (2), the court may determine that a stay is unnecessary if a protective order limiting discovery would protect the interest of one party without unfairly limiting the ability of the opposing party to pursue the civil case. In no case, however, shall the court impose a protective order as an alternative to a stay if the effect of such protective order would be to allow one party to pursue discovery while the other party is substantially unable to do so.

(4) In this subsection, the terms "related criminal case" and "related criminal investigation" mean an actual prosecution or investigation in progress at the time at which the request for the stay, or any subsequent motion to lift the stay is made. In determining whether a criminal case or investigation is "related" to a civil forfeiture proceeding, the court shall consider the degree of similarity between the parties, witnesses, facts, and circumstances involved in the two

proceedings, without requiring an identity with respect to any one or more factors.

APPENDIX E

18 U.S.C. § 983 provides, in pertinent part, as follows:

> **(c) Burden of proof.**--In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property--
> (1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;
> (2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and
> (3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.
>
> **(d) Innocent owner defense.--**

(1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.

(2)(A) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term "innocent owner" means an owner who--

(i) did not know of the conduct giving rise to forfeiture; or

(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

(B)(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law--

(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

(II) in a timely fashion revoked or made a good faith attempt to revoke permission for

those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

(ii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

APPENDIX F

18 U.S.C. § 1955 provides:

> Prohibition of illegal gambling businesses
>
> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.
>
> (b) As used in this section--
>
> (1) "illegal gambling business" means a gambling business which--
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.
>
> (2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot

machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the

proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder,

member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

APPENDIX G

19 U.S.C.A. § 1615 provides, in relevant part, as follows:

> In all suits or actions . . . brought for [ ] forfeiture . . . where the property is claimed by any person, the burden of proof shall lie upon such claimant . . . . Provided, that probable cause shall be first shown for the institution of such suit or action, to be judged of by the court . . . .